



Administrative Tribunal

Distr.
LIMITED

AT/DEC/772
2 August 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 772

Case No. 840: ZEID

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Luis de Posadas Montero, Vice-President,
presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;
Whereas, on 19 March 1995, Galal M. A. Zeid, a staff member
of the United Nations, filed an application requesting the Tribunal,
inter alia:

"[To] find that:

a) The Applicant is entitled to:

- (i) have the recommendations of the Rebuttal Panel
(...) implemented in toto, by upgrading from 'B' to
'A' ... in the rebutted PER (...) for items: 14.ii
(Accuracy and Style for both Arabic and English),
1. (Competence) and 2. (Quality of work);
- (ii) the rectification, in all cases, of the erroneous
arithmetic in the said PER (...), by correcting the
overall rating from 'B' to 'A';
- (iii) adequate material compensation to be fixed at a two
year P-4 salary for the actual and consequential
moral and material damage inflicted upon him and
for the repeated acts of prejudice to which he has
been subjected in this case;

..."

Whereas, the Respondent filed his answer on 29 March 1995;
Whereas, the Applicant filed written observations on 27 April

Whereas, the Applicant submitted an additional document on 2 May 1996;

Whereas, the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 July 1983, as an Interpreter Trainee at the P-1 level, on a two year fixed-term appointment. On 17 July 1985, he was granted a probationary appointment as an Associate Interpreter and promoted to the P-2 level. On 1 July 1986, his appointment was converted to permanent and he was promoted to the P-3 level, as an Interpreter. On 12 August 1990, the Applicant was transferred to the UN Office in Vienna (UNOV). On 1 June 1992, he was promoted to the P-4 level. He was transferred back to Headquarters on 13 September 1992 and assigned as an Arabic Interpreter in the Office of Conference Services, Interpretation and Meetings Division, Interpretation Services, Arabic.

On 5 November 1992, the Applicant instituted rebuttal proceedings relating to his performance evaluation report (PER), covering the period from 1 September 1991 to 11 September 1992. The Applicant contested the downgrading from his previous PER of three "A" (excellent) ratings to "B" (very good) ratings, contending that his reporting officer, who lacked knowledge of the Arabic language, had relied on "extraneous" opinions. This, he claimed, "constitutes a totally unfair process of highly doubtful legality, as I was never accorded the opportunity to know the sources of this extraneous opinion." He also protested the elimination of French as one of his working languages, and the overall rating of "B", although he had five "A" ratings and only four "B" ratings.

On 12 April 1993, the Rebuttal Panel submitted its report to the Director-General of UNOV. The Panel noted that, in an interview, the Applicant's First Reporting Officer could not recall the name of the third party on whose assessment he had relied. The Panel stated "that where a third-party/outside opinion was sought it

should be documented, particularly for referral purposes, as in this case". The Panel concluded that there was no basis for the lowering of the ratings. It recommended that the three "B" ratings be changed to "A", and that French be included in the PER as a passive language, with a rating of "C" (good).

On 13 September 1993, the Applicant was informed of the Director-General's decision to maintain the three "B" ratings, as well as the overall rating of "B", but to accept the Panel's recommendation regarding the inclusion of French. In his appraisal of the Rebuttal Panel's report, the Director-General noted that the Rebuttal Panel had only addressed the issue of the appropriateness of soliciting an outside opinion. He stated, "The situation obliged the first reporting officer to seek advice from outside parties. No secret was made of the procedure followed; it was clearly indicated on the PER. I do, however, accept the panel's view that in such cases the consultation with outside parties should be carefully documented for future reference.".

On 10 November 1993, the Applicant requested the Secretary-General to review this decision. On 10 January 1994, he lodged an appeal with the Joint Appeals Board (JAB). On 6 December 1994, the JAB adopted its report. Its considerations, recommendation, and general recommendation read as follows:

"Considerations

11. The Panel noted that it was not competent to judge the accuracy of the ratings the Appellant received by his supervisors, as reflected in his PER which he is challenging; nor could it deal with the evaluation thereof by the Rebuttal Panel. The Panel's role in this matter was limited essentially to determining whether improper motives, prejudice or what the Appellant terms 'arbitrariness' had entered into the ratings of the Appellant. As regards this aspect of the case, the Panel recalled that the United Nations Administrative Tribunal had held repeatedly that the burden of proving the existence of alleged improprieties is upon the Appellant. In the present case, that burden had not been discharged, in the opinion of the Panel.

Recommendation

12. The Panel therefore, unanimously recommends that the claim be rejected, in the absence of any evidence of violations of the PER procedure or of the Rebuttal procedures. The lack of knowledge of Arabic by the First Reporting Officer is not a violation of ST/AI/240/Rev.2.

General Recommendation

13. The Panel wishes to draw attention to the fact that although it did not consider itself competent to deal with the accuracy of the ratings challenged by the Appellant, the PER as well as the Report of the Rebuttal Panel, were too meager and without sufficient detailed justifications for the ratings, to allow any meaningful examination thereof. The Panel is well aware of the fact that present procedures do not provide for it (see ST/AI/240/Rev.2), but it would like to recommend that consideration be given to making changes requiring that ratings should be properly documented by the parties involved and contain the substantive reasons on which they are based. This would apply to the ratings given by the First and Second Reporting Officers, the report of the Rebuttal Panel and to the ultimate decision by the Assistant Secretary-General for Human Resources Management."

On 19 December 1994, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and advised him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's recommendation that, in the absence of any evidence of violations of the performance evaluation report procedure or of the Rebuttal procedures, the claim be rejected. The Secretary-General has decided, accordingly, to maintain the contested decision and to take no further action on your case."

On 19 March 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas, the Applicant's principal contentions are:

1. The assessment of the Applicant's linguistic skills in Arabic by the First Reporting Officer was improper, as the latter

lacked a knowledge of Arabic and relied on opinions of others whose identities were not made known to the Applicant and whom he himself is unable to identify.

2. The appraisal by the Director-General of UNOV of the Rebuttal Panel's report was arbitrary. The Rebuttal Panel included two competent professionals and its recommendation was overridden without justification and on false grounds.

Whereas, the Respondent's principal contentions are:

1. The Respondent is under no legal obligation to accept the Rebuttal Panel's recommendations. The evaluation of a staff member's performance is within the Respondent's discretionary authority.

2. The Applicant has not met the burden of proof showing that the Respondent's discretionary decision was arbitrary or vitiated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 3 July to 2 August 1996, now pronounces the following judgement:

I. The issue in this case is whether the Respondent's decision not to accept the Rebuttal Panel's recommendations to upgrade the performance ratings of the Applicant was improper, or improperly taken. The JAB upheld the Respondent's decision and noted that it was not competent to judge either the performance ratings of the Applicant, or their review by the Rebuttal Panel. Similarly, the Tribunal cannot substitute its judgement for that of the Respondent in evaluating his staff. In reviewing the Respondent's decisions thereon, the Tribunal's role is to examine whether these decisions are arbitrary, tainted by procedural irregularity, or vitiated by prejudice or other extraneous factors. This was clearly established in the Judgement No. 448, Large (1984).

II. The JAB noted that "the PER as well as the Report of the Rebuttal Panel, were too meager and without sufficient detailed justifications of the ratings, to allow any meaningful examination thereof". On this issue, the JAB made a general recommendation that "ratings should be properly documented by the parties involved and contain the substantive reasons on which they are based".

III. The Tribunal agrees with the JAB that performance ratings should be properly documented and explained. This is a fundamental requirement of due process in performance evaluation. The Applicant claims that his First Reporting Officer, not an Arabic speaker, did not consult with anyone regarding the Applicant's language skills and, hence, his evaluation was arbitrary. The Respondent, while admitting that the First Reporting Officer was not familiar with the Arabic Language, contends that the First Reporting Officer did consult with two Arabic speakers regarding the Applicant's language skills but cannot identify who they were.

IV. Even accepting the Respondent's assertion that Arabic speakers were consulted, the Respondent's failure to identify the persons consulted cannot be justified. It is in accordance with due process that the Applicant should know by whom he is being evaluated for his language abilities in a performance review.

V. The omission of French in the Applicant's PER was an error that the Respondent corrected. The Applicant has not sustained the burden of proving that the omission of French was due to "flagrant prejudice" on the part of the First Reporting Officer.

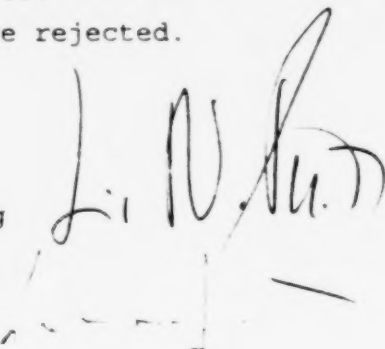
VI. The Tribunal does not find that the Respondent's decision was vitiated by prejudice or arbitrariness. However, the performance review process was tainted by the failure to identify those persons consulted, whose comments on the Applicant's performance were central to his review. In this respect, the Applicant has been denied due process.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant \$5,000.

All other pleas are rejected.

(Signatures)

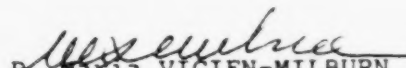
Luis de POSADAS MONTERO
Vice-President, presiding

A large, stylized handwritten signature in dark ink, appearing to read 'L. N. M.' with a long horizontal stroke extending to the right.

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 2 August 1996

A handwritten signature in dark ink, appearing to read 'R. Maria VICIEN-MILBURN' in a cursive style.
R. Maria VICIEN-MILBURN
Executive Secretary